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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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The United States seeks this Court's review of a decision of the Fourth Circuit, sitting en banc, that Congress lacked the constitutional authority to enact 42 U.S.C. 13981, the provision of the Violence Against Women Act of 1994 (VAWA) that gives victims of gender-motivated violence a private right of action against their assailants. Respondents acknowledge (Br. in Opp. 1) that "[t]he scope of Congressional authority to legislate under the Constitution is an important issue." Respondents do not dispute that the issue of Congress's constitutional authority to enact Section 13981 is a recurring one. See U.S. Pet. 18 & nn.8, 9 (citing 16 cases, in addition to this case, in which the issue has arisen). Nor do respondents identify any reason why this is not an appropriate case in which to resolve that issue definitively.

1. Respondents principally contend that "the fact that the court of appeals found an Act of Congress unconstitutional is not a sufficient ground to grant the petitions." Br. in Opp. 17 (initial capitalizations omitted). Respondents are mistaken. It is a sufficient ground to grant a petition for certiorari that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). And respondents concede (Br. in Opp. 1) that the questions of federal constitutional law decided by the Fourth Circuit in this case are indeed "important." It is not necessary in such circumstances, as respondents suggest (*id.* at 19), that the court of appeals' decision also implicate a conflict among the circuits or "so far depart[] from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power" (Sup. Ct. R. 10(a)).

This Court has consistently granted certiorari, without waiting for a conflict among the circuits, when the United States has sought review of a decision declaring a federal statute unconstitutional. See, *e.g.*, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307 (1993); *Reno* v. *Flores*, 507 U.S. 292 (1993) (federal regulation). The Court grants review in such cases for good reason. A lower court's decision to invalidate a congressional enactment, which expresses the majority's will in a democratic society, involves the most momentous application of judicial power. See *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). It is appropriate for the Court expeditiously "to review the exercise of th[at] grave power," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), so as to assure that the "considered decision of a coequal and representative branch of our Government," *Walters*, 473 U.S. at 319, is not unnecessarily countermanded. See Robert L. Stern et al., *Supreme Court Practice* 185 (7th ed. 1993) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

Although respondents cite (Br. in Opp. 18-19) four cases in which "this Court has denied review when Courts of Appeals have declared statutes unconstitutional," none of those cases involved circumstances similar to those here. In *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998) (No. 97-1047), the first case on which respondents rely, the United States, as petitioner, did not even seek plenary review of the Ninth Circuit's decision holding 18 U.S.C. 1304 to be unconstitutional. The petition asked only that the Court "vacate the judgment of the court of appeals and remand the case for further evidentiary proceedings," explaining that "this Court need not reach the underlying First Amendment issues at this time—and indeed would likely find the record * * * inadequate for that purpose" (97-1047 Pet. at 24). It would have been curious for the Court to have instead granted certiorari to review the court of appeals' decision on the merits.[1]

In two of the other cases cited by respondents, the United States opposed certiorari, noting that the court of appeals' decisions had little, if any, practical effect

[1] It was only one year later that the Court decided the constitutionality of 18 U.S.C. 1304 in *Greater New Orleans Broadcasting Co.* v. *United States*, 119 S. Ct. 1923 (1999).

and involved questions that were unlikely to arise again. In *ACORN* v. *Edwards*, 81 F.3d 1387 (5th Cir. 1996), cert. denied, 521 U.S. 1129 (1997) (No. 96-174), although the Fifth Circuit had held that the Lead Contamination Control Act of 1988, 42 U.S.C. 300j-24(d), violated the Tenth Amendment, the United States opposed certiorari because "the decision below has no further practical consequences for the federal effort to address lead contamination in schools" (96-174 U.S. Br. in Opp. at 9). The United States explained that the statute at issue had simply required the States to establish programs, by a specified deadline, to assist schools in remedying lead contamination. The deadline had since passed, all States had established the programs, and the statute imposed no further obligation on the States. *Ibid.* In *Wilson* v. *National Labor Relations Board*, 920 F.2d 1282 (6th Cir. 1990), cert. denied, 505 U.S. 1218 (1992) (No. 90-1362), although the Sixth Circuit had held that Section 19 of the National Labor Relations Act, 29 U.S.C. 169 violated the First Amendment to the extent that it did not excuse employees from joining unions based on personal religious objections, the NLRB opposed certiorari because of the "unusual circumstances" of the case (90-1362 NLRB Br. in Opp. at 12). The NLRB explained that the case was "possibl[y] moot[]" (*ibid.*) and, even if not, that "petitioner's claim of an actual and continuing injury is * * * quite thin and insubstantial" (*id.* at 14), because "even under the court of appeals' conclusion that the provision is unconstitutional, [petitioner] is not entitled to the relief that [petitioner] seeks—relief that is, in any event, essentially duplicative of relief already provided" in a related EEOC proceeding (*id.* at 15 (citation omitted)). The NLRB also noted (*id.* at 16) that the constitutional issue had never arisen in any other case.

The final case cited by respondents, *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986), is not one "declar[ing] [a] statute[] unconstitutional" (Br. in Opp. 18). The Fourth Circuit did not invalidate any portion of Title VII of the Civil Rights Act. It simply held that the First Amendment bars courts from entertaining certain Title VII claims—specifically, claims that a church (or other religious body) denied a person a pastoral position on the basis of race or sex. 772 F.2d at 1167-1172. The United States did not participate in the case, as would be expected if the court of appeals' decision posed any significant threat to the constitutionality of Title VII. See 28 U.S.C. 2403.

Those cases thus offer no support for respondents' assertion (Br. in Opp. 19) that "[w]hen a federal statute is declared unconstitutional, this Court has historically required the presence of other factors militating in favor of exercising its certiorari jurisdiction before granting a petition." The cases instead suggest that, in those rare instances where the Court declines to review a lower court decision holding an Act of Congress unconstitutional, the Court has done so because "other factors" indicate that the constitutional question is unsuitable for review. No such factors are present here.

2. Respondents also criticize (Br. in Opp. 20-26) petitioners for not responding to particular aspects of the court of appeals' lengthy opinion, including an observation that the court confined to a single footnote (*id.* at 23). Respondents misunderstand the purpose of a petition for certiorari, which is to provide "[a] direct and concise argument" as to why the case warrants this Court's review. Sup. Ct. R. 14.1(h); see also Sup. Ct. R. 14.3 ("A petition for a writ of certiorari should be stated

briefly."). It is not to engage in a point-by-point refutation of the reasoning of the opinion below. See Robert L. Stern et al., *supra*, at 357 ("The attempt to show error below * * * should not be a long, full-dress argument such as would be proper in the brief on the merits, but a condensed version of such an argument.").

While we believe that our petition adequately identifies the principal errors in the court of appeals' opinion (see U.S. Pet. 19-30), and that a more extended discussion of the merits is unnecessary at this time, we do wish to address certain of respondents' assertions.

First, we do not contend, as respondents claim (Br. in Opp. 21), that "if the activity being regulated is non-economic, it merely imposes a requirement of Congressional findings," or, in other words, that the mere existence of such findings is "dispositive." As explained in our petition (at 19-22), Congress may regulate intrastate non-economic activity under the Commerce Clause if that activity has a substantial effect on interstate commerce. See *United States* v. *Lopez*, 514 U.S. 549, 559 (1995) ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"); accord *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) ("[E]ven if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (quoted in *Lopez*, 514 U.S. at 556). Congressional findings may, however, assist the courts in determining whether Congress could rationally have found the requisite nexus to exist between the regulated activity and interstate commerce, especially where, as here, the nexus may not be obvious to those who have not studied the question. See *Lopez*, 514 U.S. at 563 (explaining that congressional findings "enable us to evaluate the legislative judgment that the activity

in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye"). Here, Congress's explicit findings, supplemented with the extensive legislative record compiled over four years of investigation, demonstrate that gender-motivated violence has a direct and substantial effect on interstate commerce. See, *e.g.*, H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 385 (1994) (Conf. Rep.) (finding that gender-motivated violence deters persons "from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce").

Second, contrary to respondents' assertions (Br. in Opp. 22-23), the present case stands in marked contrast to *Lopez*, not only because of the explicit congressional findings and extensive legislative record that underlie VAWA, but also because Section 13981 does not present the same federalism concerns as did the Gun-Free School Zones Act of 1990. The legislative record makes clear that Congress acted because the States demonstrably, and admittedly, had failed adequately to address the problem of gender-motivated violence. Indeed, the legislative record establishes a history of systemic discrimination in the States' treatment of violent crimes against women. When Congress responds to a problem with a substantial effect on interstate commerce that the States have failed to address, principles of federalism do not prevent Congress from acting and do not require that the problem go unredressed. This is particularly clear when, as in this case, Congress acts to vindicate civil rights, a paradigmatic federal responsibility. Moreover, as explained in our petition, Section 13981 is crafted to be particularly respectful of federalism concerns. Unlike the Gun-Free School Zones Act, Section 13981 provides an exclusively

civil remedy, does not make criminal conduct that was not criminal under state law, and does not otherwise "effect[] a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (internal quotation marks omitted). And Section 13981 in no way impedes state efforts to address the problem of gender-motivated violence. See Amici Br. of Arizona, *et al.* 3 ("[S]ection 13981 does not interfere with state and local governmental efforts to address the problem of gender-motivated violence.").

Third, respondents dispute (Br. in Opp. 25) that "Congress passed [Section 13981] to remedy Equal Protection violations." In enacting Section 13981, however, Congress expressly invoked its authority under Section 5 of the Fourteenth Amendment as well as under the Commerce Clause. 42 U.S.C. 13981(a). As our petition notes (at 8), moreover, Congress expressly found in enacting Section 13981 that "bias and discrimination in the [state] criminal justice system often deprive[] victims of crimes of violence motivated by gender of equal protection of the laws." Conf. Rep. 385. Congress based that finding, in part, on the reports of many state task forces on gender bias, which documented how state actors, including police, prosecutors, court personnel, and judges, have treated women's complaints of rape, domestic abuse, and other acts of violence as trivial, exaggerated, untruthful, or somehow the woman's own fault. See U.S. Pet. 8-11.

Fourth, respondents suggest (Br. in Opp. 25-26) that Section 13981 is not an appropriate remedy for discrimination in state justice systems, because Section 13981 provides a cause of action against the perpetrators of gender-motivated violence, and not against state actors. But respondents view the remedy provided by Section 13981 too narrowly. Section 13981, while giving victims a remedy for the injury inflicted by their assailants, also gives victims a remedy for the injury inflicted by state actors—*i.e.*, the victims' loss of the opportunity to see justice done against their assailants, as a result of state actors' failure to treat the victims' complaints seriously. As Congress explained, Section 13981 "allow[s] survivors an opportunity for *legal vindication* that the survivor, not the State, controls." S. Rep. No. 545, 101st Cong., 2d Sess. 42 (1990) (emphasis added).[2] Meanwhile, Congress also sought in VAWA to remedy the discrimination in state justice systems in additional ways, such as by providing funds to educate state police and prosecutors about domestic violence. See 42 U.S.C. 3796gg. Congress was entitled to conclude that this multi-pronged approach would most effectively correct the causes and remedy the effects of discrimination in state justice systems against victims of gender-motivated violence.

3. Respondents further argue (Br. in Opp. 26-30) that no circuit conflict exists concerning the constitutionality of Section 13981. We do not contend otherwise. As discussed above, because the court of appeals declared an Act of Congress unconstitutional, this Court's review is warranted in any event.

Finally, while respondents do not dispute that the court of appeals' decision conflicts with 14 district court decisions upholding Congress's authority to enact Section 13981 (U.S. Pet. 18 & n.8), respondents argue (Br. in Opp. 26) that such a conflict is insufficient, in itself, to warrant this Court's review. Again, we do not contend

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[2] It is not inconsistent with Congress's recognition of bias in state justice systems, as respondents suggest (Br. in Opp. 25), to permit victims to bring Section 13981 claims in either federal or state court. A victim may conclude that she will receive a fair hearing in a particular state court, especially given that the victim, not a state prosecutor, controls the process. To date, however, almost all Section 13981 claims have been brought in federal court.

otherwise. The district court decisions demonstrate, however, that the constitutionality of Section 13981 is a recurring question that this Court will inevitably have to decide.[3] Respondents offer no persuasive reason why the Court should not do so in this case.

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 1999

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[3] As we noted in our petition (at 18 n.9), one district court, in addition to the district court in this case, has held that Congress lacked the constitutional authority to enact Section 13981. See *Bergeron* v. *Bergeron*, No. 96-3445-A, 1999 WL 355954 (M.D. La. May 28, 1999). The United States filed a notice of appeal in *Bergeron*, but the private plaintiff did not. The Fifth Circuit has stayed any further proceedings in *Bergeron* pending the disposition of the petitions for certiorari in this case.